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No. 88-352

In the Supreme Court of the United States

OCTOBER TERM, 1988

SENATOR GORDON J. HUMPHREY, ET AL., PETITIONERS

v.

NICHOLAS F. BRADY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Salary Act of 1967, 2 U.S.C. (& Supp. IV) 351 *et seq.*, under which the President's recommendations as to the salaries to be paid to members of Congress, judges, and high executive officials become effective if not disapproved within 30 days by means of a joint resolution of Congress, provides compensation to members of Congress that is "ascertained by Law" within the meaning of the Ascertainment Clause, Art. I, § 6, of the Constitution.

2. Whether the Salary Act of 1967 is an unconstitutionally broad delegation of power to establish judicial, executive and congressional compensation.

3. Whether individual members of Congress, taxpayers or an organization of taxpayers have standing to challenge the Salary Act on either of these grounds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 848 F.2d 211. The opinion of the district court (Pet. App. 15a-28a) is reported at 665 F. Supp. 23.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988. The petition for a writ of certiorari was filed on August 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1] Pursuant to Supreme Court Rule 40.3, the current Secretary of the Treasury, Nicholas F. Brady, should be substituted as the first named respondent in the caption of this case.

STATEMENT

1. The Federal Salary Act of 1967, 2 U.S.C. (& Supp. IV) 351 *et seq.* [hereinafter the Salary Act], provides for the creation, at four-year intervals, of a Quadrennial Commission to conduct a review of salaries paid to the Vice President, members of Congress, Article III judges, high-level officials in the Executive Branch, and certain others. The members of the Commission are appointed by the President, the Chief Justice, the Speaker of the House, and the President of the Senate (2 U.S.C. (& Supp. IV) 352). The Quadrennial Commission is charged with examining the rates of pay for the positions covered by the Act for the purposes of recommending (i) the appropriate pay levels for these positions and the relationships between them and (ii) the appropriate pay relationships between those positions and the GS pay scales (2 U.S.C. (& Supp. IV) 356). A report of the results of this review, together with the Commission's recommendations, is then submitted to the President (2 U.S.C. (& Supp. IV) 357).

The Act requires the President, after he has received the Commission's report, to submit to Congress in his next budget "his recommendations with respect to the exact rates of pay which he deems advisable" for the covered positions (2 U.S.C. (& Supp. IV) 358). As originally enacted, the Salary Act provided that the President's recommendations would go into effect unless, within 30 days, Congress passed a contrary statute, or either House of Congress passed legislation disapproving them. Postal Revenue and Salary Act of 1967, Pub. L. No. 90-206, § 225(i), 81 Stat. 644. In 1977, the Act was amended so that the President's recommendations would become effective only if approved within 60 days by both Houses through roll call votes. Emergency Unemployment Compensation Extension Act of 1977, Pub. L. No. 95-19, § 401, 91 Stat. 45. Finally, in 1985, after this Court held

the legislative veto mechanism invalid in *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress further amended the Salary Act to provide that the President's pay recommendations would become effective unless, within 30 days of his report, Congress disapproved any such recommendation by means of a joint resolution. Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, § 135(e), 99 Stat. 1322.

2. In 1985, Congress also provided for a one-time supplementary Commission whose report was to be prepared in the following year (Pet. App. 17a). On December 15, 1986, this Commission provided the President with a report that recommended substantial pay increases for officials covered by the Act (*ibid.*) When the President submitted his budget to Congress on January 5, 1987, he recommended smaller salary increases for these officials, citing the need "to reduce the Federal deficit and hold the costs of government to an absolute minimum" (*ibid.*).[2]

The Senate passed a resolution disapproving the President's recommendations on January 29, 1987, and the House of Representatives passed an identical resolution on February 4. Statements by some members of both Houses expressed the position that the House resolution was untimely (Pet. App. 17a). The President signed the joint resolution, which also provided for other matters such as aid for the homeless, but noted that, on the advice of the Justice Department, he considered the portion of the resolution relating to compensation to be without any legal effect (*id.* at 18a). The officials covered by the Salary

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[2] For instance, the supplementary Commission's report recommended that the salary paid to members of Congress be increased to $135,000. The President recommended a salary of $89,500 for legislators, with higher levels for the Speaker of the House, President Pro Tempore of the Senate, and the majority and minority leaders of both Houses. 52 Fed. Reg. 4125 (1987).

Act received the increases recommended by the President in accordance with the Act.

3. Petitioners are a United States Senator and five Members of the House of Representatives (hereinafter collectively the "congressional petitioners"), as well as two individual taxpayers and an association of taxpayers (hereinafter collectively the "taxpayer petitioners"). They filed this action in the United States District Court for the District of Columbia against the Secretary of the Treasury, the Secretary of the Senate, and the Sergeant-at-Arms of the House of Representatives—the officials who are responsible for disbursing salaries to Executive Branch officials, judges, and Members of Congress pursuant to the Act (Pet. App. 15a-16a). In April 1987, a group of federal judges intervened as defendants.

An amended complaint alleged that the Salary Act has injured the congressional petitioners by (1) preventing them from exercising their legislative duty of setting their own salary, (2) diluting and diminishing their legislative powers, and (3) harming their reputation in the eyes of constituents who might hold them responsible for pay raises under the Act (Amended Compl. para. 9). It also alleged that the pay increases granted under the Act, and their alleged tendency to increase salaries paid to other officials, would impose an economic burden on taxpayers (*id.* para. 10). This injury to taxpayers, the complaint continued (*ibid.*), resulted from an exercise of legislative power under the Taxing and Spending Clause (Art. I, § 8, Cl. 1) that was allegedly in violation of the Ascertainment Clause (Art. I, § 6). On the merits, the complaint alleged that the Salary Act was an unlawful and excessive delegation of legislative power, that this delegation violated the Ascertainment Clause and the principle of separation of powers, and that Congress had timely disapproved the

President's salary recommendations in 1987 (Amended Compl. paras. 11-13).

4. On June 30, 1987, the district court granted summary judgment to respondents. The court first held (Pet. App. 20a) that the congressional petitioners' standing to bring this action was established by this Court's summary affirmance in *Pressler* v. *Simon,* 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), aff'd mem., 434 U.S. 1028 (1978), a case raising substantially the same issues as this one.[3] The district court also refused to dismiss the suit on the basis of the D.C. Circuit's "equitable discretion" doctrine, under which that court declines to hear actions brought by members of Congress for which they have an "in-house" remedy in the form of corrective legislation. Relying on dicta in *Riegle* v. *Federal Open Market Comm.,* 656 F.2d 873, 882 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981), the district court held that this doctrine requires dismissal only in cases in which a private plaintiff would be able to litigate claims that members of Congress were precluded from pursuing (Pet. App. 21a-22a).

On the merits, the district court held that *Pressler* v. *Simon, supra,* compelled the conclusion that the Salary Act does not violate the Ascertainment Clause. The court noted that petitioners had offered a number of distinctions between the statutory scheme that had been upheld in *Pressler* and the current Act, which had been amended to comply with *Chadha.* Nevertheless, the court reasoned that "the ultimate power to set aside or suspend a presidential recommendation," which Congress retains under

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[3] In the district court and the court of appeals, the taxpayer petitioners acknowledged that *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970) (three-judge court), aff'd, 401 U.S. 901 (1971), compelled a ruling that they lacked standing (Pet. App. 20a). Petitioners reserved the option, however, of revisiting that issue in this Court.

the present statute, "precludes a meaningful distinction of *Pressler*" (Pet. App. 24a-25a). Finally, the district court held that Congress's resolution purporting to disapprove the President's 1987 recommendations had not been passed within the 30-day period established by the Salary Act and was therefore without legal effect (*id.* at 26a-28a).

5. On appeal, the court of appeals held that the D.C. Circuit's "equitable discretion" doctrine required dismissal of the case and, in the alternative, affirmed the district court's ruling on the merits (Pet. App. 1a-13a).[4]

a. The court relied on *Melcher* v. *Federal Open Market Comm.*, 836 F.2d 561 (D.C. Cir. 1987), cert. denied, No. 87-1546 (June 6, 1988), in holding that it would be an abuse of discretion to allow the congressional petitioners to maintain this action (Pet. App. 6a). The court explained that *Melcher* had made clear that it was immaterial whether private parties would be able to litigate claims that the "equitable discretion" doctrine prevented members of Congress from pursuing (Pet. App. 6a & n.4). The congressional petitioners, it found, had "readily at hand * * * an 'in-house' remedy" for their alleged injuries in the form of passage of legislation amending the Salary Act (*id.* at 6a). While it expressed some concern with the "equitable discretion" doctrine (*id.* at 7a-8a), the court concluded that the law of the circuit required dismissal (*id.* at 8a).[5]

b. In the alternative, the court of appeals affirmed the district court's decision on the merits. This Court's summary affirmance in *Pressler* v. *Simon, supra,* was control-

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[4] Petitioners abandoned on appeal their argument that the disapproval resolution had been timely.

[5] The panel did specifically note, however, that it was not questioning the congressional petitioners' standing or the action's justiciability (*id.* at 7a n.4).

ling, the court of appeals explained, unless the 1985 amendments to the Salary Act had significantly altered the statute upheld in *Pressler* or the governing legal doctrines had been significantly modified (Pet. App. 10a). The court found that the "post-*Pressler* changes in the Salary Act have not altered in any significant fashion the system for setting Congressional salaries" (*id.* at 10a-11a). More specifically, the court concluded that the devices by which Congress can exercise "ultimate power to set its pay * * * remain efficaciously available" (*ibid.*), that "any post-*Chadha* tinkering" with the basic structure approved in *Pressler* has been "insignificant in relation to the overall scheme" (*id.* at 12a), and that the "marginally increased * * * difficulty" involved in disapproving a President's recommendations by joint resolution instead of a one-House veto "provides no justification for declining to follow a Supreme Court holding so closely on point" (*ibid.*). The court also rejected the suggestion that this Court's decisions in *Chadha* and *Bowsher* v. *Synar*, 478 U.S. 714 (1986), indicated that the Court would now decide *Pressler* differently (Pet. App. 11a n.7).

Finally, the D.C. Circuit rejected petitioners' argument that the Salary Act represented an unconstitutional delegation of legislative power. After construing this Court's cases as condemning "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion" (Pet. App. 12a), the court of appeals noted that "[r]ecent delegations as broad (or broader) than" the Salary Act had "survived delegation doctrine attack" (*id.* at 13a). More fundamentally, however, the court found that the Salary Act is not "a standardless delegation," since the President acts with the guidance of the Quadrennial Commission and the statute reserves to Congress the opportunity to reject or modify

the President's recommendations before they go into effect (*id.* at 13a & n. 10).

ARGUMENT

As both the district court and the court of appeals held, this case is controlled by this Court's summary affirmance in *Pressler* v. *Simon, supra.* The distinctions that petitioners draw between the statute that was sustained in that case and the current Act have no constitutional significance, and there is no other reason to reconsider the result in *Pressler.* The court of appeals' disposition of petitioners' excessive delegation claim does not conflict with the standards set forth in this Court's cases or with any decision of another court of appeals. Finally, whether described in terms of standing or the D.C. Circuit's "equitable discretion" doctrine, the inappropriateness of petitioners' claims for judicial resolution is manifest and independently justifies denial of further review.

1. Since the Salary Act's enactment in 1967, the basic salaries paid to members of Congress have been established through a three-step process. First, the Commission reviews the salaries paid to persons covered by the Act, the pay relationships among them, and the relationships between these positions and the GS schedule and provides its findings and recommendations to the President; next, the President forwards his recommendations to Congress; and, finally, the President's recommendations are subject to congressional approval or disapproval. Only the last step in the process has changed. Under the first version of the Act, in effect before the 1977 amendment, the President's recommendations became law unless either House disapproved them within 30 days of their transmittal to Congress or the Congress passed legislation superseding them. Under the second version of the Act, in effect after

the 1977 amendment, the President's recommendations became effective when and if they were approved by a vote of each House. Finally, under the 1985 amendment, the President's recommendation becomes effective unless disapproved in a joint resolution that is subject to signature by the President.

In 1976, in *Pressler*, a three-judge court held that the first version of the Act did not violate the Ascertainment Clause (428 F. Supp. 302). It explained that under this scheme congressional salaries were "ascertained by law" as required by the Ascertainment Clause (428 F. Supp. at 305), and that neither the history nor the presumed purposes of the Clause suggested that it was designed "to prevent the Congress from developing rational procedures of this type for fixing congressional compensation by means other than enacting a specific statute fixing each pay change" (*id.* at 305-306). After an appeal had been taken to this Court, the 1977 amendment was passed, and this Court vacated and remanded "for further consideration in the light of the new legislation" (*Pressler* v. *Blumenthal,* 431 U.S. 169, 170 (1977)). Observing that the new legislation would not become effective until 1980 or 1981 and thus did not affect Pressler's claims, the three-judge court reinstated its prior decision. This Court summarily affirmed (434 U.S. 1028 (1978)). In a brief concurring opinion, then-Justice Rehnquist stated that "this 'unexplicated affirmance' without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question."

Both lower courts were fully justified in concluding that the *Pressler* decision is also dispositive of petitioners' challenge to the current version of the Act. *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975). The reasoning of the three-judge court's opinion applies with equal force to the

present statute, since Congress has retained the "ultimate power to set its pay" (Pet. App. 11a). The various features of the current Act that petitioners stress—the need for action of both Houses and signature by the President, Congress's decision to do away with annual appropriations for its compensation, and the time period within which Congress must act (Pet. 13-14)—go only to the "practical difficulty" (Pet. App. 12a) of exercising that power, not to its existence.

More broadly, the issue that *Pressler* decided is no more deserving of plenary review now than it was then. On its face, the language of the Ascertainment Clause requires only that Members of Congress "receive a Compensation for their Services," that this compensation be "ascertained by Law," and that it be "paid out of the Treasury of the United States." The Salary Act fully complies with each of these requirements. Specifically, with respect to the point in dispute here, congressional salaries are "ascertained" by a "Law," the Salary Act. The additional requirements for which petitioners argue—*i.e.*, that salaries can be "ascertained" only by a "Law" that sets dollar amounts or relies on calculations like cost-of-living increases which petitioners would characterize as "objectively determinable" (Pet. 12)—cannot be found in the language of the Clause.[6]

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[6] The history of the Ascertainment Clause is also inconsistent with petitioners' attempt to make it a prohibition on the delegation of any part of Congress's power to establish its compensation. There is no hint in the records of the debates accompanying the adoption of this provision at the Constitutional Convention that the Framers conceived of it as such. Rather, the discussions in this area took place on a far more fundamental level. The principal issue at the Convention was whether the States or the federal government would pay members of Congress. 1 W. Benton, *1787: Drafting the U.S. Constitution*, at 686, 689-692, 692-694, 696-698, 700-702 (1986). There was also consideration of whether members of one or both Houses would be paid at all

Nor does this conclusion threaten any principle of accountability that the Ascertainment Clause might be said to express. It is clear in the Salary Act that the "ultimate authority" over, and thus responsibility for, Congress's compensation remains with Congress. Individual members are free to express their positions by voting on a resolution of disapproval within the framework of the Act, or by supporting legislation setting different salaries for themselves. There is nothing to prevent Congress from repealing the Act. Finally, petitioners' complaint alleges that some of their constituents hold them responsible for Congress's pay raise (see page 4, *supra*), an indication that the public understands who is accountable for the results of this legislation.

2. Petitioners assert that the terms of the Act's delegation to the President "are more open-ended" than other statutes that this Court has upheld (Pet. 15) and suggest that this case therefore presents the question whether the excessive delegation doctrine must "be interred" (Pet. 16). However, the power delegated to the President under the Salary Act to fix legislative, judicial, and executive compensation, properly understood and viewed in its context, is sufficiently limited. The court of appeals' holding to this effect does not go beyond this Court's cases in this area.

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and whether Congress could be trusted with fixing its own pay, as opposed to having it fixed in the Constitution itself. *Id.* at 686, 687, 689-691, 693, 696, 698, 703. The three phrases in the Ascertainment Clause correspond to these three very basic issues. In terms of the language of the clause, the Framers decided that members of Congress were to be paid for their service, "receive a Compensation", rather than working for free; that their compensation was to be fixed by legislation, "ascertained by Law," rather than by the Constitution; and that the money was to come from the federal government, "out of the Treasury of the United States," rather than from the States.

The core issue, when a statute is challenged as an excessive delegation, is whether it contains an "intelligible principle" guiding executive action (*J.W. Hampton, Jr. & Co.* v. *United States,* 276 U.S. 394, 409 (1928)). Only if it could be said "that there is an absence of standards for the guidance of" executive action, "so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would [a court] be justified in overriding its choice of means for effecting its declared purpose." *Yakus* v. *United States,* 321 U.S. 414, 426 (1944). The language defining the President's function under the Salary Act, which is to recommend "the exact rates of pay which he deems advisable" (2 U.S.C. (& Supp. IV) 358) after receiving the Quadrennial Commission's report, fully satisfies these standards and is comparable to other formulations that this Court has upheld. *E.g., Yakus,* 321 U.S. at 420, 427 (approving statute which delegated to price administrator the power to promulgate regulations fixing prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act"); *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 398 (1940) (quoting similar statutes); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 214-215, 225 (1943) (upholding delegation of power to license radio communications and promulgate regulations in accordance with the "public convenience, interest, or necessity"); *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591, 600 (1944) (statute authorizing agency to fix "just and reasonable" rates for natural gas).[7]

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[7] In *AFGE* v. *Reagan,* 806 F.2d 1034, 1038 (Fed. Cir. 1986), cert. denied, No. 86-1349 (May 26, 1987), the court upheld Congress's similar delegation of authority under the Federal Pay Comparability Act of 1970. In issue in that case was the constitutionality of a provision (5 U.S.C. 5305(c)(1)) which authorizes the President to submit pay schedules in the form of an "alternative plan" which "he considers

Moreover, petitioners' exclusive focus on the language of the Salary Act ignores the significant limitations within which the President must operate. His recommendations are made only once every four years, and must be included in the budget submitted to Congress immediately after his receipt of the Quadrennial Commission's report. The recommendations can take only one form—"the exact rates of pay" for persons within the Act's coverage. Finally, as the court of appeals emphasized, the recommendations are not immediately effective (Pet. App. 13a & n.10). The relatively limited nature of the power exercised by the President under this scheme contrasts markedly with the authority of executive officials under a host of other statutes to design and modify wide-ranging regulatory programs on an ongoing basis. These features of the Salary Act also distinguish this case from the parade of horribles that petitioners advance (Pet. 16).

Further, the President's judgment as to what salaries are "advisable" is not unguided. The President acts only after he has obtained a detailed study from a Commission whose mandate is to review the pay rates for the offices covered by the Act and to recommend appropriate relationships both among those offices and between those offices and classified positions in the Civil Service (2 U.S.C. (& Supp. IV) 356). While the Commission's report is not binding, it provides a starting point for the President's decision. It is not sensible or necessary to review this statute on the assumption that the President will simply ignore the Commission's work.[8] The Commission's report

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appropriate" (one which bypasses the standards and procedures generally applicable (5 U.S.C. 5301(a)), if "because of national emergency or economic conditions affecting general welfare" the President considers it "inappropriate" to follow those standards.

[8] Indeed, the five Presidents who have made pay recommendations under the Salary Act have either adopted the Commission's recom-

also provides the Congress with information enabling it to exercise its role of reviewing and possibly overturning the President's recommendations. The Congress that enacted it understood that the Act would operate in this manner.[9]

The President's recommendations for compensation under the Act are also restrained by a matrix of related statutory and constitutional limitations on salaries. The Compensation Clause, Art. III, § 1, of the Constitution, prohibits reductions in the salaries paid to Article III judges, a large category of officeholders covered by the Salary Act. Further, "Congress has enacted an interlocking network of statutes to fix the compensation of high-level officials in the Executive, Legislative, and Judicial Branches * * *." *United States* v. *Will,* 449 U.S. 200, 202 (1980). This "network" includes, in addition to the Salary Act, the Federal Pay Comparability Act of

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mendations or, while scaling them down or stretching them out, provided an explanation for their departure from the Commission's proposals. Message from the President, *Salary Reform for Top Officials,* H.R. Doc. 91-51, 91st Cong., 1st Sess. (1969); 1976-1977 Pub. Papers 1068; 1980-1981 Pub. Papers 2867; 23 Weekly Comp. Pres. Doc. 11, 12 (Jan. 5, 1987).

[9] See 113 Cong. Rec. 28642 (1967) (remarks of Rep. Udall); *id.* at 36101, 36107 (remarks of Sen. Monroney). See also *Report of the Subcom. on Presidential Pay Recommendations of the House Comm. on the Post Office and Civil Service,* 95th Cong., 1st Sess. 9 (Comm. Print 95-4) (1977) (Commission's study provides "an empirical basis for the President's recommendations," insuring "that Presidential or Congressional action regarding the pay adjustments will not occur in a vacuum"). See generally *Industrial Union Dep't* v. *American Petroleum Inst.,* 448 U.S. 607, 676 (1980) (Rehnquist, J., concurring in the judgment) ("One of the primary sources looked to by this Court in adding gloss to an otherwise broad grant of legislative authority is the legislative history of the statute in question.")

1970, 5 U.S.C. 5305-5306, which establishes a mechanism by which Civil Service salaries are compared to and adjusted in light of salaries in the private sector, and the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, which provides for increases in the salaries of senior officials in the Executive, Legislative, and Judicial Branches tied to cost-of-living adjustments in the GS schedule. This network fixes a number of points which the President will, as a practical matter, take into account when formulating his recommendations under the Salary Act. For instance, the salaries of high Executive officials established under the Salary Act have to be considered in light of the figures for their subordinates set by the Federal Pay Comparability Act. The Commission in turn is required to state appropriate pay relationships between Executive officials and members of Congress (2 U.S.C. (& Supp. IV) 356). Any theoretical possibility of unrestrained Presidential action is limited accordingly.

In view of this combination of factors, the Salary Act sufficiently marks the "boundaries of the field of" the President's action. *Yakus,* 321 U.S. at 425. The statutory standard of "advisability," to which petitioners devote all of their attention, "need not be tested in isolation." *American Power Co.* v. *SEC,* 329 U.S. 90, 104 (1946). The narrow limits on the form of the President's action, as well as the Act's "factual background and the statutory context in which [it] appear[s]" (*ibid.*) foreclose petitioners' excessive delegation claim.

3. The congressional petitioners seek further review of the questions whether they have standing to pursue this action and, if so, whether their claims could properly be dismissed as a matter of judicial discretion (Pet. 17-19). In the same vein, the taxpayer petitioners seek reconsideration of *Richardson* v. *Kennedy,* 313 F. Supp. 1282 (W.D. Pa. 1970), aff'd, 401 U.S. 901 (1971), which they

conceded was controlling in the lower courts. While we disagree with the court of appeals' determination that the congressional petitioners had standing (Pet. App. 7a n.4), that court did hold that the merits were not appropriate for judicial determination under its "equitable discretion" doctrine. In this case, this difference in approach does not require further review by this Court.

a. Under the analysis applied in this case and in others, the D.C. Circuit has not allowed concerns arising from Article III to enter its analysis of the standing of individual Members of Congress. *Riegle* v. *Federal Open Market Comm.*, 656 F.2d 873, 877-878 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). Instead, those considerations are expressed through the court's "equitable discretion" doctrine, which applies when a congressional plaintiff can obtain a remedy through the legislative process. "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute," the court of appeals will "exercise its equitable discretion to dismiss the legislator's action." *Riegle,* 656 F.2d at 881.

In our view, it is unwarranted to exclude from the analysis of standing concerns regarding the appropriate role of the Judiciary in resolving disputes between or within the other Branches. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen* v. *Wright,* 468 U.S. 737, 752 (1984). Indeed, this aspect of standing should take on added significance when a case involves "relationships between the coequal arms of the National Government," because " '[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.' " *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S.

464, 474 (1982) (quoting *United States* v. *Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

More specifically, the congressional petitioners were granted standing in this case on the basis of allegations that the Salary Act has prevented them from exercising their legislative duty under the Ascertainment Clause and that their lawmaking powers have been diluted and diminished. See page 4, *supra*.[10] In our view, these allegations do not raise an injury that is " 'distinct and palpable' " (*Allen* v. *Wright*, 468 U.S. at 751 (quoting *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)), nor do they give the congressional petitioners a personal stake in the outcome, as opposed to a " 'generalized grievance[ ] about the conduct of government or the allocation of power in the Federal System' " (*United States* v. *Richardson*, 418 U.S. at 173, quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968)). At bottom, these claims of injury are only a restatement of the debate over whether the Salary Act is constitutional.[11]

The court of appeals held that the case should be dismissed based upon the "equitable discretion" doctrine.

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[10] See also, *e.g.*, *Moore* v. *U.S. House of Representatives*, 733 F.2d 946, 951 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985) ("deprivation of an opportunity to debate and vote on the origination of" a tax bill in the House). In general, it appears that the D.C. Circuit will recognize as "injury in fact" any infringement on a legislator's "rights to participate and vote on legislation in a manner defined by the Constitution" (733 F.2d at 951).

[11] Even if a violation of the Ascertainment Clause constituted a cognizable injury, any such injury would be to the Congress as a whole, and not to its individual members. In the courts below, the Sergeant-at-Arms of the House of Representatives argued that the congressional petitioners, including those who are members of the House, lacked standing on the ground that this case involved an intra-Branch conflict. The Secretary of the Senate and the intervenor judges took no position on this issue.

While our view is that the dismissal should have been for lack of standing, this difference in approach—between a disposition expressed in terms of the court's discretion and one based on the limits of the court's judicial power—does not warrant further review in this case. First, the court of appeals' analysis of standing and its "equitable discretion" doctrine have so far been limited to the D.C. Circuit, and have not resulted in any conflict among the courts of appeals.[12] Second, since the D.C. Circuit has stripped its "equitable discretion" doctrine of any possible exception for cases that could not be pursued by a private plaintiff, that court's doctrinal framework will apparently require the dismissal of most suits by individual congressmen who would lack standing under our view. There is, accordingly, no urgent need to resolve this issue, particularly in a case where a dismissal is the result under either approach.[13]

[12] In *Dennis* v. *Luis*, 741 F.2d 628 (1984), the Third Circuit found that members of the legislature of the Virgin Islands had standing to challenge the Governor's attempt to appoint an "acting" Commissioner of Commerce, allegedly in violation of a statute requiring the consent of the legislature and the Revised Organic Act of the Virgin Islands, 48 U.S.C. 1597(c). While this case provoked a debate among members of the panel as to the validity of the D.C. Circuit's approach to standing and the "equitable discretion" doctrine (see 741 F.2d at 630-634; *id.* at 638-640 (Adams, J., concurring in part and dissenting in part)), much of that debate was unnecessary to the decision, which did not involve the separation of powers among the branches of the federal government. To our knowledge, the Third Circuit has not subsequently addressed the issue.

[13] We note that this Court has denied certiorari in a number of cases presenting the issue of congressional standing. *Melcher* v. *Federal Open Market Comm., supra*; *Moore* v. *U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); *Riegle* v. *Federal Open Market Comm.*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

Finally, as petitioners point out (Pet. 18), some members of the court of appeals have questioned the D.C. Circuit's approach to standing and its "equitable discretion" doctrine.[14] It is entirely possible that the court might hear these issues en banc if a case should arise in which points in dispute within the court would be decisive.

b. The taxpayer petitioners also urge the Court to consider whether taxpayers have standing to challenge alleged violations of constitutional provisions other than the Establishment Clause (Pet. 19-20). In *Flast* v. *Cohen*, 392 U.S. 83, 102-103 (1968), however, this Court made clear that a taxpayer will not have standing as such unless (1) he or she "allege[s] the unconstitutionality * * * of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution;" and (2) "show[s] that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power * * *." The Court has often reaffirmed these standards. See *Bowen* v. *Kendrick*, No. 87-253, slip op. 26-27 (June 29, 1988); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 228 (1974); *United States* v. *Richardson*, 418 U.S. at 173-175; *id.* at 194 (Powell, J., concurring); *Valley Forge*, 454 U.S. at 476-482.[15] In fact, in *Richardson* v. *Kennedy*,

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[14] For instance, in this case, the members of the panel noted that they all shared concern over the doctrine of "equitable discretion" (Pet. App. 7a-8a (citing *Melcher*, 836 F.2d at 565 (Edwards, J., concurring), 565 n.4)). See also *Barnes* v. *Kline*, 759 F.2d 21, 41-71 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot *sub nom. Burke* v. *Barnes*, 479 U.S. 361 (1987); *Moore* v. *U.S. House of Representatives*, 733 F.2d at 956-965 (Scalia, J., concurring in result).

[15] The dissent by Justice Brennan in *Valley Forge* left open the possibility that taxpayer standing could exist to challenge exercises of the spending power premised on limits on that power other than the Establishment Clause. 454 U.S. at 507-508 n.18. Whatever the cor-

313 F. Supp. 1282 (W.D. Pa. 1970), aff'd, 401 U.S. 901 (1971), this Court summarily affirmed a decision by a three-judge court holding that a taxpayer's challenge to the Salary Act satisfied neither of *Flast*'s requirements. The lower court concluded in that case that Congress's authority to provide for payment of congressional salaries is "completely independent of the taxing and spending clause," because it derives from the Ascertainment Clause itself. 313 F. Supp. at 1286. It also held that the Ascertainment Clause "will not qualify as a Constitutional provision restricting the taxing and spending power" (*ibid.*). Those conclusions remain fully justified. Unlike the Establishment Clause, which can be conceived of as a prohibition on certain types of spending, the Ascertainment Clause, even under petitioners' view, at most limits the form that legislation establishing compensation must take and does not prohibit spending or require any particular level of spending or taxation. There is no reason to reconsider *Richardson* or to revisit well-settled principles of taxpayer standing in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Acting Solicitor General**

OCTOBER 1988

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rectness of that reservation, the Ascertainment Clause does not appear to be a limit on the spending power, as is the Establishment Clause.

* The Solicitor General has recused himself in this case.

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